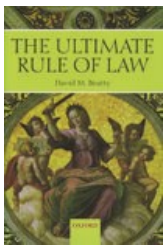

The Ultimate Rule of Law

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https://doi.org/10.1093/acprof:oso/9780199269808.001.0001

Published: 2004 **Online ISBN:** 9780191710063 **Print ISBN:** 9780199269808

CHAPTER

1 *The Forms and Limits of Constitutional Interpretation*

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https://doi.org/10.1093/acprof:oso/9780199269808.003.01 Pages 1–35

Published: January 2004

Abstract

The faith that so many people have placed in the judiciary is one of the defining characteristics of our age. The problem is that constitutional exhortations proclaiming the inviolability of life, liberty, and equality, that are the centrepiece of virtually all bills of rights, actually tell judges very little about how to solve the hard, real-life disputes they are called upon to decide. It is the fact that constitutional texts almost never provide direct answers to the cases that are taken to court that makes the idea of judges being able to tell people they cannot decide for themselves whether to recognise a right to abortion or gay marriage so problematic. This chapter discusses the forms and limits of constitutional interpretation of the law, along with compatibility issues between judicial review and democracy. Judicial practice and three theories of judicial review are also examined, namely, contract theory, process theory, and moral theory.

Keywords: judicial review, democracy, contract theory, judges, law, constitutional interpretation, moral theory, process theory, judicial practice

Subject: Jurisprudence and Philosophy of Law, Primary Sources of Law, Courts and Procedure

Collection: Oxford Scholarship Online

1. JUDICIAL REVIEW AND DEMOCRACY

Conflict is everywhere part of everyday life, and, if Darwin is right, it has always been and must always be that way. Even in the most developed and enlightened societies, ideas and ideologies clash and compete for recognition and rewards. Religious and ethnic minorities resist assimilation and the forces of globalization that threaten their identities. Women struggle for emancipation from the bonds that male-dominated assemblies have imposed and, in some communities, still insist be maintained. The poor and downtrodden groan against the injustice of a world in which they are left malnourished and cold.

If conflict is endemic to the human condition its resolution (or at least regulation), is essential for the species to survive. At different times and in different places, various methods have been tried. Physical force has usually been the default rule for the most difficult and deeply felt disagreements. Spiritual inspiration, divine revelation, and religious codes have also been timeless sources of authority to settle all manner of conflict and controversy. Negotiation and strategies of compromise and give and take are universal solvents of discord and dispute that have come to play an increasingly prominent role in the modern era, both in local conflicts and on the international stage. And, over the course of the last two hundred years, democratic decision-making has almost completely displaced the divine authority of the clerics and the kings.

Recognizing that the people were sovereign, and establishing democratic forms of government, were undoubtedly enormous improvements on the monarchies and theocracies of times gone by, but it was far from a perfect solution as the fascist and 'people's' democracies of the last century tragically attest. Majorities can abuse their authority just like Hart's highwayman whose power, like theirs, stems from the barrel of a gun.[1] Left on their own, democracies can strip people of their belongings and their dignity and, where capital punishment is legal, even kill them on the spot. The defining events of the twentieth century confirmed the truth of Blackstone's observation, more than two hundred years ago, that there is no power
p. 2 that can control politicians bent on acting 'contrary ↳ to reason' in democracies in which the sovereignty of the majority's rule is absolute and unconditional.[2]

How to ensure that the atrocities that have been committed in the name of the people don't happen again is a global problem. It is a challenge that more and more countries around the world have had to face. Remarkably, many communities, at the moment of their liberation from despotic and arbitrary regimes, have looked to the courts for help. Over the course of the last fifty years, more and more judges have been given the power to review the way in which the two elected branches of government exercise the coercive authority of the state. Whether the politicians and their officials have crossed the line has been left to the judiciary to say. They are expected to provide answers to the most controversial and contested political and moral dilemmas; to tell the people who is right and what they can and cannot do.

The faith that so many people have placed in the judiciary is one of the defining characteristics of our age. In an era of intense globalization, making judges responsible for testing the legitimacy of laws passed in the name of the people, against rules and principles that are embedded—more or less explicitly—in a constitutional text, has flourished as never before. The idea of a 'higher law' that could tell people whether their own rules and regulations are legitimate has been around for a long time. The concept of law in Greek and Roman times included a hierarchical structure and theories of natural law have been part of Europe's political and legal tradition for hundreds of years.[3] But until now the idea that the courts should be given the final say on how a society's most controversial social conflicts should be resolved has not been widely shared. Even in Europe large pockets of resistance remain. In France the arbitrariness of the courts (known as *parlements*) during the *ancien régime* permanently discredited the idea of judicial review in 'la Republique', and in England Edward Coke's famous claim for the supremacy of the judiciary and the common law[4] was never the reigning orthodoxy and was repudiated by the time of Blackstone, if not long before.[5]

Until its unprecedented proliferation over the last fifty years the idea of looking to the courts to be the ultimate arbiters of social conflict had for a very long time been exclusively an American idea. In the United
p. 3 States, where law was first proclaimed to be the king,[6] judicial review was a matter of simple logic. ↳ Once it was decided to adopt a written constitution with a federal structure and an entrenched Bill of Rights, there really was no other choice. Having established limits on what majorities could and could not legitimately do, neither the legislative nor executive branches could be given the job without violating the principle of impartiality which forbids anyone being the judge and a litigant in the same case. To have a fair and neutral resolution of disputes between majorities and those over whom they rule, it was necessary that the decision-maker be independent and have no direct interest in the case.

John Marshall, the first great Chief Justice of the US Supreme Court, saw the Court's responsibility very clearly. 'It is emphatically the province and duty of the judicial department', Marshall wrote in the seminal case of *Marbury* v. *Madison*, 'to say what the law is ... So if a law be in opposition to the constitution ... the court must determine which of [the] conflicting rules governs the case. This is the very essence of judicial duty.'[7] Nor did he have any doubt that, because constitutions are the supreme authority in all legal systems —the mother of all laws, some might say—where an act of government is 'repugnant' to the constitution it cannot, any more than can a highwayman, have any legal force or effect.

In the rest of the world it was the legacies of the fascist and socialist states in the second half of the century that led to the proliferation of constitutions in which courts were given the power of reviewing the work of politicians and other public officials. The practice was picked up first by the Austrians and Germans following the First World War and then by all the defeated powers, as well as India and the members of the Council of Europe, after the Second.[8] After the fall of the Berlin Wall, judicial review spread into central and eastern Europe, Africa, Asia, and the Middle East.[9]

Making politicians justify their behaviour in court offered a way to curb the excesses and abuses of majoritarian models of democracy in which legislative power is absolute and unbridled. Again and again, as new states were built on the ruins of authoritarian and dictatorial regimes, people looked to the law and the courts to ensure the horrors of their histories would never haunt them again. By the end of the twentieth century, constitutional democracies had taken root on every continent, giving credence to the claim of one of its leading theorists that the idea of judicial review and enforcement of basic human rights is the single most important contribution the United States has made to political theory.[10]

p. 4 The American juggernaut has not, however, been welcomed everywhere. Although there is a logic and justice in giving judges the job of drawing the borders between the reach of a majority's legitimate lawmaking authority and the domain of individual and minority rights, even in the United States there remains a very serious concern about its compatibility with bedrock principles of democracy and the ultimate sovereignty of each person to govern him- or herself.[11] For many, a process in which unelected judges oversee the activities of the elected branches of government fits uneasily in communities committed to a democratic form of government in which the general will of the people—not the legal opinion of a judge —is sovereign. Especially when a constitution is written in the lofty and inspirational style of the American Bill of Rights, the power of judicial review risks running roughshod over the principle of separation of powers and replacing the threat of a tyranny of the majority with an oligarchy of the courts. While white South Africa, almost to a person, was in favour of empowering a Constitutional Court to oversee the politicians and their officials when the country became truly democratic, many black South Africans questioned why, at the moment of their liberation, they should shackle their freedom in this way.

The problem is that constitutional exhortations proclaiming the inviolability of life, liberty, and equality, that are the centrepiece of virtually all bills of rights, actually tell judges very little about how to solve the hard, real-life disputes they are called upon to decide. The great majestic phrases characteristic of all constitutional texts provide little practical guidance on such controversial questions as whether women have a right to abort a foetus or whether gays and lesbians have a right to marry. Whether religious communities have a right to establish and seek state support for separate schools and whether those schools can refuse to admit and/or employ people whose morals and/or religion are different than their own, cannot be answered just by reading words such as 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.'[12] Similarly, when constitutions contain positive guarantees of, for example, 'emergency medical treatment' or 'access to adequate housing'[13] the text doesn't tell the court whether a person dying of kidney failure has a right to receive dialysis treatment[14] or a person who is homeless has a right to shelter from the cold;[15] at least, not in so many words.

p. 5 It is the fact that constitutional texts almost never provide direct answers to the cases that are taken to court that makes the idea of judges being able to tell people they cannot decide for themselves whether to recognize a right to abortion or gay marriage so problematic. If judges are free to define such words as 'life', 'liberty', and 'equality' anyway they please, their supervision of the elected branches of government doesn't make any sense. If the job of the judge is to mark out the boundaries of legitimate lawmaking on the basis of what he or she thinks is fair and just, there can be no reason why a judicial opinion should ever 'trump' judgements of the people and their elected representatives. If the limits of legitimate lawmaking are just a matter of personal opinion, majorities can claim a moral authority in the sovereignty of the people that judges and minorities lack.

To reconcile the practice of judicial review with the sovereignty of people to govern themselves, it is necessary to show that courts do not resolve conflict and judge the way those in government exercise the powers of the state on the basis of their own personal opinions of what is right and wrong. One needs a theory about the way in which judges should exercise their powers of review that tells them how they can distinguish laws that are a legitimate expression of the coercive powers of the state from those that are not without being influenced by their own biases and personal points of view. Theory, as Oliver Wendell Holmes once said, is as foundational to the integrity of the law as the architect is to the building of a house.[16]

2. CONTRACT THEORY

In the earliest years that judicial review was practised in the United States, there does not seem to have been a lot of discussion about how the judges ought to read and think about their new constitution. It apparently was not (and for some still isn't)[17] thought that there was (is) any need for a grand theory of constitutional adjudication. It seems it was just taken for granted that the constitution should be read the way those who were responsible for its entrenchment, and those whose lives it was meant to control, understood it. For judges and commentators alike, 'the first and fundamental rule in the interpretation of all instruments is to construe them according to the sense of the terms and the intention of the parties'.[18]

Preserving the original meaning of the constitution was a natural thing for the first generation of judges to have done. Adopting an 'originalist' approach to constitutional interpretation made for a simple and
p. 6 straightforward account that was easy for ordinary people to understand. It coincided with the belief that ↳ constitutions were addressed to 'the common sense of the people' rather than codes that required 'logical skill or visionary speculation' to be fully understood.[19]

The approach fitted naturally with the American instinct for practical, commonsense reasoning. Like Rousseau, the early American jurists thought of their constitution as a social contract and interpreted it as such. As with the enforcement of any agreement, judges were expected to give the words of the text the meaning that those who wrote and consented to be governed by them understood them to have.[20] So, for example, if it was the common understanding at the time of its adoption that the Fifth Amendment (that no person can be deprived of their life or liberty without due process of law) did not restrict the people's right to pass laws that made sodomy and abortion illegal, that is the meaning it must always have unless and until it is changed. Similarly, if it was never intended that the equal protection clause of the fourteenth amendment would have any application to the state's treatment of women or gays, it could still not be of any help to them today.

Ensuring the words of the constitution retain their original meaning also conforms with the common understanding that constitutions are supreme or basic laws that articulate foundational, long-term, political settlements. Constitutions are expected, as John Marshall famously observed, 'to endure for ages to come'.[21] They are solemn pacts in which communities commit themselves to their deepest values and highest aspirations. They are supposed to stand above and be immune to the passion and prejudices of

politics. Unlike ordinary legislation and commercial agreements, constitutions are intended to be resistant to change and typically are much more difficult to amend. Reading the words of a constitution the way they were originally understood allows it to function as a moral 'centre of gravity' and provide a measure of certainty and stability that is essential for the effectiveness and integrity of any legal system.

The logic of reading the American constitution as it was originally understood made a lot of sense in the years immediately following its adoption and for many people, including William Rehnquist, Antonin Scalia, and Clarence Thomas, who currently sit on the US Supreme Court, it still makes good sense today. For them, originalism solves whatever contradiction or tension exists between judicial review and democracy in a way that respects the distinct authority of each. Judges ensure politicians and public officials operate within the rules and constraints that are laid out in the constitution. If the constitution is silent on a question, the judge has no role to play and majorities are entitled to do whatever they want. Courts must defer to the choices made by the legislature unless they clearly contradict some provision of the constitution. In the
p. 7 extreme, where a ↳ constitution is wholly unwritten, as in the United Kingdom, the judges have no authority to impose any substantive limits on the powers of the elected branches of government whatsoever.

In addition to its maximizing the sovereignty of each new generation to fashion the character of the communities in which they live, originalists also claim the historical method of interpretation is able to constrain judicial discretion, and counter any temptation a judge might have to decide cases on the basis of his or her own values, better than any other approach. Originalist theories, they say, have a neutrality about them that no other theory can match. They make historical facts the test of whether a law is constitutional or not and so purport to avoid questions of politics and morality altogether.

The story modern originalists tell is of judges applying principles and rules settled at the moment when a constitution comes to life without regard for their own personal and political views. Like high priests preserving the integrity of a sacred text, by remaining faithful to its original ambition their neutrality is preserved. The derivation, definition, and application of the principles that distinguish laws that are legitimate from those that are not all lie beyond their control. The impartial application of historical principles determines the outcome of every case.

Originalists say their theory allows each case to be presented and analysed as a syllogism.[22] The major premise is a rule or principle—such as 'Congress shall make no law respecting an establishment of religion' or 'no State shall … deny to any person … the equal protection of the laws',[23]—that was part of the original understanding. The minor premise requires the judges to determine whether that principle or rule is threatened by the law or state action they have been asked to review. (Laws making sodomy a crime do (or do not) deny gays the equal protection of the law.) If a judge thinks the law is in conflict with the constitution, she or he must declare it to be invalid even if sympathetic to what it is trying to do. By contrast, laws that a judge personally thinks are offensive and/or ill advised must be allowed to remain on the books unless it can be shown that they violate one of the constitution's prescriptions in some way. The conclusion follows inevitably from the way the minor premise is phrased.

The distinction that originalists draw between judges doing politics and enforcing the law is always sharp and often very painful to apply. So, for example, originalists say it is just not possible to find welfare rights in the American constitution if it is interpreted to give effect to its original understanding, even though those who are least well off can make a very powerful moral claim for their community's assistance and
p. 8 support.[24] For the same reason originalists think judges would do wrong and distort the original meaning of ↳ the Eighth Amendment (outlawing cruel and unusual punishments) if they declared capital punishment to be unconstitutional because they were convinced America would be a more just society if it were never allowed to take another person's life.[25] On the originalists' account of judicial review, gays can never claim the protection of the Fourteenth Amendment (guaranteeing every person the equal protection of the law)

because, at the time of its entrenchment at the end of the American Civil War, it was understood only as the legal recognition of the emancipation of the blacks who had previously been enslaved.[26]

Originalists say judges lose their neutrality and act illegally when they add or subtract rights from what was initially agreed to and claim an authority to dispense justice according to their personal beliefs of what is right and wrong. If abortion, capital punishment, and sodomy laws are not among the subjects which the constitution puts beyond the reach of the democratically elected representatives of the people, then judges must accept their legitimacy. Judges must defer to the value choices of the people and the representatives they elect to act on their behalf. Legislators can claim a moral authority based on the sovereignty of the people that no one who sits on the Bench can match. The golden rule of originalist interpretation is that if a judge can find nothing in the constitution that limits what a democratically elected majority can do, she or he must stand aside and allow the will of the people to prevail.[27]

Originalists insist that if Americans want to make capital punishment and laws that single out and disadvantage gays and lesbians unconstitutional, they must follow the procedures the constitution provides for its own amendment. Abolitionists and gay activists cannot ask the court to issue rulings it has no constitutional authority to make. To permit a court to override the intention of those who created a constitution on the basis of what it thinks is just and fair amounts, from an originalist's perspective, to authorizing those who have been put in charge of guarding the constitution to carry out an endless series of mini *coups d'état*.[28]

As it has been developed and defended in the United States over the course of the last two hundred years, the originalist account of how judges should address the moral and political conflicts that their communities find most difficult to resolve makes a very persuasive case. The theory has been embraced by some of the most articulate and intellectually rigorous judges in the country and, at the same time, it is easy for ordinary people to understand. There is an inescapable logic in grounding the Court's authority in the ambition of
p. 9 those who were responsible for and directly affected by the entrenchment of the constitution ↳ and the role it anticipates judges will play imposes the narrowest possible limits on the power of each generation to govern itself democratically. It would be natural to expect that, as other countries put written bills of rights into their constitutions, judges and commentators in other parts of the world would find originalism equally persuasive. But it hasn't turned out that way. Although historical references to the founding moments of a new constitutional order can be found in the jurisprudence of every court, originalism has generally not played well in other parts of the world.[29] Even in the United States, originalism is now decidedly the minority view. In fact, in professional journals and judicial opinions, originalism has been subjected to sharp and sustained criticism from commentators and fellow judges alike.[30]

The problem with originalism is that, no matter how good it sounds in theory, in practice it can't meet the standards it sets for itself. Directing judges to resolve the flashpoints of social conflict in their communities against the understandings of people who lived as long as two hundred years ago, leaves them, it turns out, free to come down on whatever side of a case their consciences tell them is right. There is in originalism, in fact, no neutrality in the derivation, the definition, or even the application of the law.

Originalist theories of judicial review fail their own standards of legitimacy because they are based on empirical assumptions that are factually false and normative claims that are logically flawed. Their take on the understandings surrounding the entrenchment of the American Bill of Rights fits awkwardly at best with the actual historical events and their claims of neutrality are circular and question-begging. The fact of the matter is that originalist orthodoxy is entirely the creation of the legal imagination, wholly a matter of myth. There never is or was only one, single, common understanding of what the great guarantees of life, liberty, and equality were intended, let alone understood, to mean. Constitutions are where each community's great political compromises are made so that the intention that animates them is invariably multiple, often conflicting, and always complex.

Telling judges they must give effect to the original understanding of the constitution doesn't provide them with any guidance or direction and imposes no constraints because there are countless understandings from which they can choose. Quantitatively, the number can be huge. The hard, empirical reality is that, given the number of people it takes to bring a constitution to life, let alone the number who acknowledge it as the
p. 10 supreme law in their lives, it is never ↳ possible to speak of a single collective intent. As Larry Alexander, one of America's leading constitutional theorists once put it, 'if there are no group minds, how can there be group intentions?'[31] For Alexander and many others the question is rhetorical because constitutional intentions are the product of hundreds, sometimes thousands of individual wills and so the most that can ever be said of collective activities, such as the decision to adopt a constitutional bill of rights, is that there has been a vague and ill-defined convergence of many minds.

Even in those parts of a constitution where it is possible to speak of a general understanding of what certain words were meant to guarantee, it is usual to find more than one intention at work. For example, in interpreting the words of the Fourteenth Amendment of the US constitution that guarantees every person 'the equal protection of the laws' it is possible to speak about an intention to use that particular set of words and a separate intention to bring about certain specific results. So, even though the basic purpose of the amendment, which was adopted in 1868, was to guarantee the blacks who had been freed from slavery after the Civil War the same legal status and civil rights as whites, the words that were chosen to reach that result were not limited to the emancipation of African Americans or even to the elimination of racial discrimination more generally. In effect, the Fourteenth Amendment can be said to contain what Ronald Dworkin has called both a 'semantic' intention and an 'expectation' intention[32] which, in cases alleging discrimination against Muslims or women or lesbians and gays or the poor, would lead to opposite results. Read literally, the words of the Fourteenth Amendment are equally intolerant of discriminating against people because of their race or religion or sex or social position. From the perspective of those living in the United States in 1868, the thought that lawmakers could no longer pass laws that might incidentally disadvantage women and gays and certain religious groups would have never crossed their minds.

Originalists can never supply definitive answers in such cases as these because the words and the political motivation underlying the Fourteenth Amendment point to very different meanings that can reasonably be ascribed to the text, and originalism has nothing to say about which one a judge ought to choose. Both can be said to be part of the document's collective intent. After all, if the equal protection clause of the Fourteenth Amendment was always and only about discrimination against blacks, Congress and the states could have said just that.

Originalism suffers from the problem of there being too many different understandings from which each judge is free to choose. Even common understandings about abstract principles of justice that everyone
p. 11 accepts can be articulated at different levels of generality.[33] Depending on the level of generality ↳ a judge prefers, originalism can be 'hard or soft',[34] 'strict or moderate'[35] in what it recommends and has to say and originalism again provides almost no guidance as to which level of generality is uniquely correct. As a practical matter, judges on the US Supreme Court are on their own when they decide whether to read the Fourteenth Amendment as a proscription against discrimination against blacks, or all races including whites, or women or gays, or invidious discrimination of all kinds.[36] Instructing the judge to choose the 'level of generality that interpretation of the words, structure and history of the Constitution fairly supports'[37] is no answer because the words, structure, and history of the text point in different directions. Where the plain words of the Fourteenth Amendment are easily wide enough to stop governments discriminating against people because of their sex, the history that lies behind them is not.

The fact that there are invariably multiple intentions and understandings caught up in the entrenchment of a constitutional Bill of Rights means originalism can never be as neutral as it claims constitutional theory must be. Because it is not possible to identify a single, dominant rule or criterion for each case, judges can justify just about any result that they want. Faced with the question of whether the Fourteenth Amendment

protects women and gays against sex discrimination, originalist judges are free to privilege that part of the original understanding that leads to the result that they believe is morally right.

Originalists do recognize that establishing the original meaning of different parts of a constitution can be a difficult and uncertain task but they resist the conclusion that this means originalism does not qualify as a neutral theory of law. Some say the uncertainty and difficulties of determining original understandings are not as great as those that plague rival theories. Antonin Scalia has tried to make the case for originalism in this way, but without much enthusiasm or conviction.[38] Claiming originalism is less partial than rival theories is to try to salvage it with an apology rather than an argument. Even if it were true, it would not establish its neutrality. The most it can prove is that other ways of interpreting the constitution are illegitimate as well.

Others maintain the neutrality of originalism ultimately resides in the fact it was the method that those who were responsible for the entrenchment of the constitution intended judges to use. Robert Bork, one of the
p. 12 most prominent ↳ exponents of originalism, has defended its neutrality in this way.[39] Originalism, Bork claims, is the only interpretative theory that can be derived from the original understanding and not the legal philosophy of each judge. However, Bork's attempt to defend the originalist approach to judicial review on the basis that it was the interpretative part of the original understanding has elicited mostly derision and scorn.[40] Bork's defence was dismissed as being seriously mistaken both in its logic and on the facts. On the empirical side, the critics pointed out, Bork never provided any hard evidence that originalism was actually understood to be the preferred interpretative strategy when the Bill of Rights was entrenched. He offers no proof that originalism was, as a matter of historical fact, part of the original understanding. In fact, what evidence exists on the way people thought about how legal texts should be interpreted, as well as the broad and sweeping style of the text, suggests just the opposite.[41]

More importantly, Bork's opponents made the point that it wouldn't have mattered even if his argument was based on good history. Even if the expectation in 1791 and 1868 had been that the American Bill of Rights would always be interpreted to give effect to its original meaning, that isn't a good enough reason, by itself, for it still to be interpreted that way today. Everyone, including originalists, recognizes that had the Bill of Rights been strictly interpreted according to the understandings that prevailed when it was entrenched, America would be a very different place than it is today. It is widely accepted that if the US Supreme Court had remained faithful to originalism as the only legitimate way to read the American constitution, many of the rights and freedoms that are cherished most by Americans would be lost. Freedom of speech and religious liberty, for example, would enjoy much less protection because when they were adopted everyone thought the First to the federal government ('Congress shall make no law …') and had absolutely no application to the states. Similarly, opportunities for inequality and discrimination would be greatly expanded because no one understood the Fourteenth Amendment to bind Congress in any way ('no state shall …'). If the US Bill of Rights meant today what it did to those who witnessed its birth, privacy would no longer be recognized as a fundamental right, gender stereotyping would be widespread, forced sterilization of people convicted of a criminal offence would be legal, and interracial marriages could still be banned.[42]

p. 13 In extending the reach of the American Bill of Rights no one says the US Supreme Court exceeded its authority or acted illegally. Everyone, originalists included, recognizes that the judges who actually sat on the cases that raised these questions all faced a choice. They could have been governed by the generally accepted understandings of the First, Fifth, and Fourteenth Amendments that prevailed when they were made part of the constitution. Or they could, as they did, read the words as expressing a deeper and broader moral principle that better reflects how we understand such words as 'life', 'liberty', and 'equal protection of the laws' today. In order to do justice to the people who pleaded for their help, they decided to follow the logic of the text and extend its protection in ways that had never been contemplated when it was originally being debated and discussed.

Moreover, even if (contrary to the evidence), the judges had been told that an originalist approach to constitutional interpretation was an integral part of the original understanding when the Bill of Rights was adopted, the outcome almost certainly would have been the same. The judges would still have had to decide which method of interpretation they should employ. The fact that it was expected that judges would always and only enforce the original meanings of the constitution would not be persuasive for a judge like Holmes, who believed cases should 'be considered in light of [their] whole experience and not merely ... [on] what was said a hundred years ago'.[43] For Holmes, and likeminded judges, the question would be why shouldn't current understandings supersede original meanings if we now know the latter to be arbitrary and unjust, and for that question the answer that they were not part of the original understanding wouldn't cut any ice. In the great, pivotal cases that mark the growth and development of American constitutional law, the fact that those who were responsible for the entrenchment of the Bill of Rights believed that future generations should read its words as they were originally understood can never by itself be conclusive. It doesn't explain why the constitution must always be read looking backwards, with an eye to the past, rather than with full knowledge of the present. What is needed is an independent reason, some separate principle or value that would justify the serious costs that the originalist interpretation would entail. In all these cases there is a contest between several possible meanings that could only be settled by reasons and arguments that are independent of the methods of interpretation that lie behind each.

Both Bork and Scalia acknowledge that there are occasions when it is legitimate for judges to adopt meanings that depart from and even contradict original understandings. Each recognizes that original meanings may have to give way, for example, to prior decisions of the Court, even if there is good reason to
p. 14 think they are wrong, where they have become so embedded in current practice that to ↳ overturn them would threaten stability and settled expectations in the country.[44] Both would also abandon original meanings when the words of the text or even their own moral scruples told them that was the right thing to do. Bork, for example, seems open to reading the words of the Fourteenth Amendment that guarantee everyone 'the equal protection of the laws' literally, so as to cover discrimination on the basis of sex even though originally they were only aimed at ridding the country of certain especially egregious forms of discrimination that targeted blacks.[45] Scalia has admitted that for him the limits of originalism would be reached if a government ever passed a law that authorized public lashings or branding for certain criminal offences. Even if it could be shown these were not regarded as 'cruel or unusual' punishments in 1791 (and even though he personally believes a challenge to capital punishment couldn't 'pass the laugh test'[46]), Scalia is confident that no thoughtful judge would allow any government to engage in such brutality and 'originalism as a practical theory of exegesis must somehow come to terms with that reality'.[47]

The fact that an originalist theory of interpretation cannot provide answers in very basic cases that are satisfactory to its strongest supporters shows that it is not neutral in the way its defenders claim. It cannot be derived neutrally from within the four corners of the constitution nor is it capable of providing neutral definitions which will enable judges to decide cases impartially and without giving in to their own personal preferences and priorities. That originalism is incapable of meeting its own standards of legitimacy has been known for a long time. Its inadequacy as a theory justifying judicial review became especially acute, however, during the 1950s and 1960s when Earl Warren was Chief Justice of the US Supreme Court. The Warren Court is famous in the annals of American constitutional law because it constituted one of the most active, interventionist periods in its history. In its most celebrated ruling in *Brown* v. *Board of Education*,[48] it said segregated schools denied black Americans equal protection of the law. In other major decisions it defended the rights of those accused and/or convicted of a criminal offence,[49] insisted on the principle of one person, one vote[50] and began to mark out the boundaries of a fundamental right of privacy.[51] Many of its decisions were very controversial and many scholars were highly critical of the Court's jurisprudence, including *Brown*,[52] because, even though they were sympathetic with the outcomes of the cases, they
p. 15 thought the judges ↳ had exceeded their powers of review. Originalists were especially critical of the jurisprudence of the Warren Court. They accused the Court of reading its own values into the constitution in

all its landmark rulings on equality, privacy, due process, and free speech. Even *Brown* v. *Board of Education*, the Court's landmark ruling ordering an end to segregation in American schools, was not easy to justify on historical grounds.[53] At precisely the moment when the American idea of judicial review needed it most, there was no theory that could account for or support it.

In time, and within a few short years of each other, two new theories were offered to explain and defend the reasoning, if not all the results, of the Warren Court and the practice of constitutional review more generally. One made policing the procedures and processes of politics the primary function of the judiciary; the other called on judges to make political philosophy the ultimate source of all the really important rules of constitutional law. Process theorists argued that the best way to reconcile judicial review with the democratic character of modern government is for courts to focus all their energies ensuring that the institutions and processes of politics work fairly and effectively rather than worrying about outcomes and results. The theory that calls on judges to give a moral reading to their enforcement of the constitution, by contrast, asks them to formulate the best description of the moral principles that fit the broad contours of a country's constitutional experience and that does the most credit to the nation. Each approach has been endorsed by some of the world's foremost scholars and commentators of constitutional law. Both present attractive pictures of how courts can reconcile law and politics effectively and in a way that does justice to both. Neither, however, has been able to withstand the criticisms of the other and so the stalemate, and absence of a credible theory, endures.

3. PROCESS THEORY

John Hart Ely, one of America's most respected legal scholars, provided the first, full-length account of a procedural model of judicial review in 1980 in his book *Democracy and Distrust*.[54] He was especially stimulated by the jurisprudence of the US Supreme Court during Warren's tenure as Chief Justice. Ely's project was to address the controversy surrounding the Warren Court and give it a sympathetic interpretation. Ely read the Court's major judgments as being animated by the idea that, in reviewing the acts of the elected branches of government, the Court's overarching concern should be to help those who
p. 16 could not protect ↳ themselves politically. Rather than testing the laws that are enacted in a legislature or decreed by the executive against substantive moral values, Ely saw the leitmotif of the Warren Court as ensuring everyone could participate in and benefit from the processes of politics on more or less equal terms. Judges, Ely said, should take their cue from the Warren Court's agenda of guaranteeing that the ordinary institutions of politics worked fairly, remained open to change, and did not systematically exclude or work to the disadvantage of particular groups. In Ely's view, all the broad and open-ended guarantees of the American constitution should be interpreted with this overarching orientation in mind.[55]

Ely argued that his theory of how judges should think about exercising their powers of review was consistent with and made proper sense of the most important parts of America's constitution including the Bill of Rights. A processbased theory of judicial review was, he said, 'entirely supportive of the American system of representative democracy' and 'assigns judges a role they are conspicuously well situated to fill'.[56] Making value determinations and establishing the moral character of their communities was for the people, not the courts, to do. The job of the judge is to supervise and act as guardian of the processes of politics and government to ensure they are not weighted unfairly in anyone's favour and so not 'deserving of trust'. In Ely's mind, the unique contribution that courts can make to government, based on the principle of representative democracy, is to prevent 'the ins [from] choking off the channels of political change to ensure that they will stay in [power]' and from 'systematically disadvantaging some minority out of simple hostility or ... prejudice ...'.[57] Judges certify the integrity of the processes of democracy by guaranteeing that everyone's political and civil rights of speech and assembly and voting are respected and in particular making sure that society's habitually unequal and poorly represented groups, like racial minorities and

individuals caught up in the criminal justice system, are not prejudiced by their inability to negotiate the labyrinths of politics. By contrast groups such as women, who actually constitute a majority of the electorate and have the capacity to look after their own interests are expected to do so; and substantive issues of morality and public policy, such as abortion, are left to the people, through their elected representatives, to resolve.

Ely's book got rave reviews. It was hailed as a 'work of outstanding merit',[58] a 'dazzling intellectual performance',[59] and for at least one commentator, 'the single most important contribution to the American theory of judicial review written in the century'.[60] In a postmodern age of radical pluralism in moral and political theory, the idea of seeking consensus on fair procedures touched a chord that resonated with a lot of people. On further reflection, however, few thought Ely had made out his case.

p. 17 Many different criticisms were made of the book. In different ways most reviewers challenged Ely's attempt to separate process from substance. A constitution such as the American Bill of Rights, they said, which guarantees people the freedom to follow the religion of their choice, for example, self-evidently contains both. Even those sympathetic to a process-based model of judicial review recognized that Ely hadn't been able to deliver on his promise of a theory in which judges would be able to decide whether laws were constitutional or not without having to evaluate the political and moral trade-offs they make.[61] If, as he insisted, the American constitution required the moral character of the community to be constructed by the people through their elected representatives and not by the courts, Ely's own theory couldn't pass the test. Reviewer after reviewer told Ely that any judge who tried to follow his advice would have to make the very kind of choices about fundamental values that his theory said judges must avoid.

The commentators were relentless in their criticism that, by itself, Ely's theory of judicial review was 'radically indeterminate and fundamentally incomplete'.[62] They showed how, in innumerable ways, the concept of representative democracy was too vague, capable of supporting too many different arrangements, to be able to tell judges how they should exercise their powers of review. It didn't give them any guidance on what kinds of rights of participation and representation they should defend or who the beneficiaries of their protection should be.[63] It didn't even determine the most basic rules of representation, such as how votes should be counted or how electoral districts should be drawn.

Telling judges their primary responsibility is to ensure that the way politics is conducted is fair and all inclusive doesn't give them a clear picture of what the process must look like if it's going to measure up. As Ronald Dworkin pointed out, it doesn't even provide any direction on basic rights such as free speech which for proceduralists are regarded as fundamental and deserving vigorous protection from the courts.[64] The aphorism that the judges should help those 'who can't help themselves politically' doesn't identify the circumstances in which it is legitimate for majorities to limit people's freedom to say what they want and those in which it isn't. How, it was asked, are judges, who are committed to the idea that their role is to ensure the political system remains open to change through peaceful persuasion, to decide whether lifestyle choices, such as same-sex marriages, that seek to convince by demonstration and example, qualify as the kind of speech that the constitution guarantees?[65] However they rule, the participation and representation
p. 18 of some people will be ↳ advantaged while others will be affected adversely. Even speech rights that conform to more traditional modes of political participation simultaneously impose limits on the power of democratically elected legislatures and the people they represent. Thinking strictly in terms of process doesn't tell you how to resolve conflicts of this kind and where the line should be drawn.

The incapacity of Ely's process-based theory to identify what types and modes of expression warrant constitutional protection was highlighted by many commentators as illustrative of its incompleteness and indeterminacy. It showed judges needed something more, something other than procedural criteria, to distinguish cases in which the political system was not working fairly from those in which those who lost out in the legislative or regulatory process could not be said to have a legitimate cause to complain.[66] Ely

understood the problem and he recognized that, in a representative democracy where 'value determinations' were the responsibility of the people's elected representatives, just because a group felt aggrieved—even intensely—about a law that denied them a benefit or disadvantaged them in some way didn't invariably mean government was malfunctioning or that the courts should intervene.[67]

Ely argued the courts should come to the aid only of those who were systematically disadvantaged by majorities acting out of prejudice and crude hostility but, as the commentators were quick to reply, that solution could be defended only on substantive moral grounds, which his theory was supposed to avoid. Allegations of prejudice, as Laurence Tribe pointed out in an especially effective critique, inescapably involve making judgments on issues of substantive morality.[68] When someone says that a law that denies them benefits it makes available to others or seeks to disadvantage them in some other way is motivated by prejudice and hostility, they usually mean that they disagree with the reasons given for their selective treatment. For example, no one, including Ely,[69] thinks that burglars (a group that is certainly the focus of widespread hostility) are being punished, by laws making theft a criminal offence, out of prejudice. To the contrary, virtually everyone thinks it is perfectly legitimate to treat thieves as pariahs precisely because of the importance most people attach to their property and physical security. So too with laws making sodomy an offence, or denying same-sex couples the civil status of being married, that discriminate against lesbians and gays. Whether a judge concludes these laws are examples of prejudice or are based on a substantive moral vision of what constitutes proper behaviour (like the laws against burglary), depends on fundamental moral choices about whether sexual identity is part of what it means to be a person and so, unlike burglary, can be characterized as a fundamental human right.

That Ely had not succeeded in constructing a theory of judicial review in which judges could avoid having to make value judgements about complex and controversial moral issues, the reviews were unanimous. But not
p. 19 everyone ↳ thought that it followed from Ely's failure that the process model of judicial review was inherently flawed. Some theorists argued that even though Ely was mistaken in thinking judges who stick to process need not make decisions on issues of substantive political morality, a model that was dedicated to making democracy work better was still the best alternative around.

These theorists conceded, even celebrated, the substantive morality of the process model of review. In their minds there is no higher value than a community that governs itself rationally and fairly. If politics is rid of all its inequities and imperfections, the individual and the community of which she or he is a part can flourish simultaneously. Indeed, they say the process model of judicial review is not only consistent with the noblest aspirations of individuals and communities alike, it is uniquely capable of 'creat[ing] the preconditions for a wellfunctioning democratic order, one in which citizens are genuinely able to govern themselves'.[70] By directing judges to take an aggressive role in policing the procedures and processes of democracy, courts work co-operatively with politicians and other public officials to establish structures and institutions of government that are just and fair rather than having to act confrontationally by drawing boundaries beyond which the sovereignty of the people and their representatives does not reach.

The idea of defending a process-oriented theory of judicial review on a republican vision of a community of people who are encouraged and able genuinely and fairly to govern themselves has appealed to a number of prominent theorists. In the United States, Cass Sunstein has pressed the logic of the process model the furthest. Sunstein believes a good constitution should create an environment in government that combines 'political accountability with a high degree of reflectiveness and a general commitment to reason-giving'[71] and a responsible court should interpret it with these ideas in mind. Sunstein has no doubt of the Court's importance in a community's quest for what he calls 'the ideal of deliberative democracy', but he is equally emphatic that its role is for the most part a secondary and supportive one.

Like Ely, Sunstein believes the case for a vigilant and aggressive judiciary is strongest when it is alleged that the institutions and processes of government are defective in some way.[72] Beyond that, he is nervous about

courts becoming entangled in 'managerial issues'—such as poverty, health care, or discrimination against gays—where considerations of substantive morality and public policy are at stake. In cases of this kind Sunstein believes the appropriate role of the judiciary is 'catalytic' rather than 'preclusive'.[73] He argues the
p. 20 virtues of a deliberative democracy and cautions judges to work through their dockets 'one ↳ case at a time'[74] and avoid the construction of large, overarching frameworks of analysis. Except when democratic rights such as the vote or political speech are at stake, or when politically vulnerable groups are at risk, judges should defer to decisions of the politicians and their officials. On controversial moral issues such as abortion and same-sex marriage he thinks it is best for courts to move incrementally.[75] He is critical of the way the US Supreme Court carved out a broad and categorical right to an abortion in *Roe* v. *Wade* because in his view it intensified and exacerbated divisions that already fractured American society. Even when a court believes a case of discrimination has been made out, Sunstein thinks there will be instances when it ought to tolerate laws and regulations that are arbitrary and unjust. In order to maximize the values of deliberation and self-government, it is neither inconceivable nor inappropriate that sometimes constitutional rights go unenforced.[76]

Sunstein was not the first to follow Ely's lead and make 'democratic deliberation' the central value in a theory of constitutional review. Patrick Monahan, one of Canada's leading constitutional law scholars, advanced the same argument almost fifteen years earlier. Indeed, Monahan argued that the theory that a constitution should be interpreted as an embodiment of democratic ideals is even more fitting for Canada's Charter of Rights and Freedoms than it was for the American Bill of Rights.[77] It was, he said, more in keeping with the country's political traditions and the emphasis in the Charter on government support of community and group rights.

For Monahan, like Sunstein, defending judicial review in the name of democracy means the judiciary's mandate operates within very specific and narrow boundaries. Because judicial review hosts an 'elite debate in which only elite voices are heard'[78] it can never be a substitute for democratic dialogue and discussion. So, like Ely and Sunstein, Monahan is instinctively opposed to the judicial enforcement of social and economic rights because they would significantly reduce the scope for political dialogue and deliberation. On Monahan's theory, after a court has satisfied itself of the fairness of the basic infrastructure of democracy and maximized its openness to the 'revisionary potential of politics', its authority will have run its course. Like all proceduralists, Monahan thinks the court's primary role is to 'protect the basic infrastructure of liberal democracy', including rights of assembly, debate, and free elections, in order to ensure that access to and participation in the political process is roughly equal. Beyond that, the authority of the judge is limited. It is up to the people, through the representatives they elect, to decide what the moral character of their
p. 21 communities and the rules of social co-operation will be. '[I]f the collective morality of the ↳ community is to become more informed,' Monahan concludes, 'this will be achieved through more rather than less democracy.'[79]

Both Monahan and Sunstein are public lawyers and, as advocates of a process model of judicial review, the accounts they offer are, like Ely's, lean and generally devoid of large theoretical claims. They declare their biases in favour of democracy and self-governing communities and are essentially content to leave it at that. They make no effort to refute the claims of Ely's critics that it is impossible to derive a process-based model of judicial review from neutral sources of politics or law.

Their ambition for their treatises is professionally modest and to the point. Their project is to explain how the process model of judicial review can 'lend structure and intelligibility to legal analysis'.[80] Both aim to help judges identify the types of argument (doctrinal, analogical, textual, etc.) they should use when interpreting a constitution and they spend little time trying to fit their ideas about legal reasoning into larger theories of politics and law. Sunstein, in particular, is emphatic that large-scale theories of politics and moral philosophy are alien to legal reasoning. Law is an intermediate, 'mid level' method of reasoning that is based on 'incompletely theorized agreements'.[81] In his view, and Monahan's as well, high theory is a

subject for the elected branches of government and not for the courts. For both of them, doing theory is playing politics, not practising the law.

Not everyone who endorses a process model of judicial review, however, is averse to reflecting about it abstractly and in very philosophical terms. Jürgen Habermas, one of Europe's leading social scientists, has written a huge and highly theoretical book, *Between Facts and Norms*, in which the democratic conception of constitutional adjudication is grandly defended as being both neutral as between positivistic and moralistic theories of law[82] and as uniquely capable of justifying the coercive powers of the state.[83] In Habermas's terms, 'in complex societies, law is the only medium in which it is possible reliably to establish morally obligated relationships of mutual respect even among strangers'.[84] Law occupies a space between morality and reality and brings about their mutual reconciliation within the parameters of a single case. It serves, like a bridge, as a link between the real and the ideal without privileging or disadvantaging either.

Like all proceduralists, Habermas assigns the judiciary the responsibility of certifying the legitimacy of law by ridding the processes of democracy—indeed all social structures—of their inequities and arbitrariness. The idea is that if judges do their job properly, democracy offers an ideal way for resolving conflict and reconciling competing ideologies and visions of life. When it functions perfectly, all communication and consent is uncoerced and nothing but 'the force of the better argument' wins the day. The test, for
p. 22 Habermas, of whether ↳ a law is legitimate, is whether 'all possibly affected persons could agree [to it] as participants in rational discourses'.[85] He calls it a 'discourse principle' and claims it is neutral with respect to morality and law. It neither relies on a set of higher, overarching moral principles nor rubberstamps the preferences and prejudices of the people whenever they are expressed in a politically acceptable way. As a practical matter the discourse principle is presented as simultaneously conferring 'a legitimating force on the legislative process' and giving rise to 'a logical genesis of rights'.[86] Conceptually 'the genesis of rights' is said to be 'a circular process' in which the legal code (of judicially protected rights) and the principle of democracy are 'co-originally constituted'.[87]

On Habermas's understanding of what makes law legitimate, the role of the court is to ensure everyone enjoys all those rights and freedoms that are required to be a 'participant in rational discourses'.[88] Judges gauge the legitimacy of law by examining the rationality of the democratic procedures through which it must pass. To ensure participation is fully rational, the judiciary must guarantee not only that the traditional political, civil, and legal rights are respected, but that social and economic rights are provided for as well. Habermas is clear and unequivocal that there can be no legitimate law if people don't enjoy the full range of both positive and negative rights.[89]

Habermas believes the judiciary is uniquely well suited to perform this task because of the 'superior rationality of its professional discourse'.[90] He describes legal reasoning as a process involving the application and concretization of general rules and principles to particular facts, which is a different method of argumentation than the usual terms of engagement in political debate.[91] Law is a way of communicating between the moral and empirical. It creates a space in which it is possible to engage in social mediation 'between facts and norms'. It is the unique logical structure, which distinguishes what Habermas calls 'discourses of application', that gives law its exceptional capacity for rationality.

Habermas is familiar with Ely's and Sunstein's writing and generally is very sympathetic to what they have to say. His orientation, however, is focused more on clarifying the neutral premises from which a process model of judicial review can be derived and less on how it actually works. His ambition, unlike theirs, is to demonstrate how understanding the role of the judiciary the way they do grows out of the most basic conceptions of democracy and the law. Habermas wants to show that a process model of judicial review can be derived from concepts that transcend individual constitutional texts. His idea is that a process model of judicial review guarantees the integrity of both democracy and law simultaneously. It is the fulcrum around which the internal relation between law and democracy is organized. Law and democracy are both

p. 23 preconditions and products of each other. Law satisfies the discourse principle only if it is enacted within ↳ a democratic process, which in turn is only legitimate so long as it operates within the parameters of the law. Courts are uniquely situated to supervise and oversee the dialectic between the two.

Whether Habermas's attempt to provide a 'neutral derivation' of a process model of judicial review comes to be understood as a 'considerable theoretical advance', as has been suggested,[92] remains to be seen. It seems unlikely, however, that it will ever be regarded as having opened up a 'new paradigm of law'. Habermas's orientation is too abstract and his presentation too dense to be of much assistance to the judge who must translate the discourse principle into practical rules of constitutional law.[93] Indeed, when he does turn his mind to real concrete questions—such as what rights people can claim from their governments and how vigorously judges should exercise their powers of review—his reflections show just how unprincipled and open to manipulation the process model can be. Even if it can claim a neutrality in its conceptual derivation, the discourse principle cannot come close to the standards of neutrality that constitutional theories are expected to meet.

For Habermas, the logic of 'ensur[ing] that the process of lawmaking takes place under the legitimating conditions of deliberative politics'[94] means the judiciary's supervision of politics must be 'active' and 'far reaching', even 'bold'.[95] To guarantee rational participation in all the processes through which communities organize their affairs, rights must protect people from all abuses of power, not just those committed by the state. For Habermas, the logic of a democratic theory of judicial review requires 'economic power and social pressure … to be tamed by the rule of law no less than … administrative power'.[96] 'Basic rights to the provision of living conditions' are implied as well.[97]

Habermas's interpretation of what rights judges should recognize and how they should exercise their powers of review is exactly the opposite of what the process theorists in North America have had to say. Ely, Monahan, and Sunstein, as we have seen, all think a process model contemplates a much more modest role for the judiciary, and in particular that it would—and should—not do much, if anything, for the poor.[98] The idea that courts should read in and/or enforce welfare rights in order to promote the political participation of people disadvantaged by economic insecurity makes Sunstein 'nervous'.[99] For Monahan, social and economic rights are both illogical and undesirable. Their recognition would make unelected judges rather
p. 24 than politicians responsible for setting welfare ↳ budgets and the tax schedules that are required to fund them and so 'would vastly limit the scope for democratic debate and dialogue rather than expand it'.[100] Such a result, Monahan argues, is precisely what the democratic conception of judicial review was designed to avoid.

The fact that a process model of judicial review can support two completely contradictory conclusions, on issues as important as these, undercuts any claim of neutrality that may be made on its behalf. Process theorists cannot even come to a common understanding among themselves about what democracy looks like and what rights it guarantees. Moreover, other conflicting opinions could be added to the mix. Frank Michelman, for example, another leading process theorist in the United States, has staked out a position—in support of a limited range of social and economic rights—somewhere between Habermas and the others.[101]

Even Ely, Monahan, and Sunstein see things differently when it comes to issues of sex discrimination.[102] Ely believes that because all the legal barriers that used to block women's participation in politics have been removed, it is no longer credible to claim they are incapable of being able to advance their own interests politically. In systems of government that recognize the right of majorities to rule, women have the power in their numbers to protect their position fully. As a result, Ely says, except in rare cases of blatant prejudice, there is no justification for courts to invalidate laws that disadvantage women on the ground that they discriminate on the basis of sex.

For Patrick Monahan, the logic of the democratic model of judicial review is exactly the opposite. The formal, legal equality of men and women in politics is not as significant for him as it is for Ely. In his view the really critical fact of modern politics is that women continue to participate politically much less extensively than men. For Monahan, the fact of women's unequal influence means that whenever they are not treated as well as men by the state, courts have a constitutional obligation not simply to intervene but to subject such decisions, as the products of a tainted process, to a 'heightened standard of review'.[103]

Cass Sunstein's position on what role courts should play in confronting laws and government policies that disadvantage women is characteristically ambivalent and seems to fall somewhere in between. Like Monahan, he knows that women are still vulnerable to being discriminated against because of their sex notwithstanding the fact that the political influence they can exert is potentially very large.[104] However,
p. 25 because he thinks that the principle of equality that is ↳ guaranteed in the American constitution is beyond the competence of the judiciary to apply he argues, like Ely, that the cause of women is better protected in the legislature than in the courts.[105]

The different opinions process theorists can offer on how actively courts should be involved on issues as basic as social and economic rights and sex discrimination confirms that, as a practical matter, a process model is incapable of defining neutral principles that will ensure that judges do not decide cases on their own personal (political) points of view. Judges, like the theorists, are free to invoke the model to justify whatever position they prefer. Like originalism, process theory can be used to defend just about any and every result.

The fact that process theorists have not been able to provide judges with a principled way of deciding hard cases did not, for many, come as a great surprise. For Ronald Dworkin, the failure of the process model parallels the inability of originalism to meet its own standards of neutrality.[106] Each aspires to a model of judging in which courts can avoid making decisions on substantive moral problems but both lack the resources, in history and procedure, to identify overarching first principles that can provide an objective framework in which arbitrary and illicit acts of government can be distinguished from those that are legitimate and benign. For Dworkin, and others, the lesson to be learned from the fact that neither originalism nor process theories can meet their own standards of legitimacy is the futility of trying to shield the courts from the highly charged and often painful moral dilemmas that are at the centre of all the really hard cases they are asked to resolve.

4. MORAL THEORY

Dworkin thinks that everyone who cannot see that moral reasoning is a necessary component of all constitutional adjudication has, like an ostrich, his or her head buried in the sand.[107] Because of the inevitability of its playing a crucial role in the resolution of every case, Dworkin's solution is to ensure it is carried out as sensitively and with as much sophistication as possible. He is convinced there is no other alternative.[108] It follows for Dworkin that moral neutrality is not the appropriate standard or status that judges should aspire to achieve. Rather, he says we need a more modest set of criteria to judge the integrity of constitutional theory; one that tests how thoughtfully judges have evaluated and reconciled the competing moral claims that are at the heart of every major constitutional case, rather than how skilfully they have pretended to avoid them. For him, the proper measure of a theory's integrity is how well it
p. 26 accords with the words of the constitution—as they have been understood by those for ↳ whom they were written and by those who preceded them on the Bench (the criterion of fit), and how much good, how much justice it is able to achieve (the criterion of value). Fit and value, not some unattainable ideal of neutrality are, Dworkin thinks, all that can be asked of any theory.

Dworkin's call for relaxing the standards of constitutional theory cannot be dismissed as a crude attempt to manipulate the rules to suit his own purposes. Many would say that Dworkin is the pre-eminent legal philosopher in the world today. The breadth and depth of his writing is exceptional. In his capacity to speak to the big theoretical questions and to the practising judge simultaneously he has few, if any, peers. On the one hand, like Habermas, his ambition is nothing less than a general theory that can justify the coercive force of the law. His project, carried out in a series of books and essays, covers virtually every important dimension of legal theory.[109] His collective works purport to provide an account of law that overcomes the stalemate that has dominated debates in legal philosophy for hundreds of years between those ('positivists') who think its essence lies in the procedures and institutions through which it is enacted and proclaimed and those ('natural lawyers') who believe its true core consists in the justice and morality it secures.

Dworkin's concept of law, like Habermas's, grows out of a political philosophy that rejects the idea that democracy can be reduced to the simple formula of majority rule.[110] He shares, with process theorists, the belief that the judicial enforcement of constitutional rights is consistent with democratic principles and the sovereignty of the people to govern themselves. In his view, both democratic decision-making and the judicial enforcement of human rights give expression to and can be derived from a deeper moral principle, drawn from liberal political theory, that recognizes each person as someone entitled to being shown 'equal concern and respect' by the state. Indeed, as we have seen, Dworkin thinks the process of judicial review and the legal enforcement of individual rights is the most important contribution Americans have made to democratic theory.[111]

But unlike Habermas, Dworkin is not content to devote all his energy to exploring and explaining the theoretical foundations and connections between democracy and the law. As a common lawyer, Dworkin is just as interested in hard, practical cases and much of his writing is intended to provide guidance to judges on the nature of adjudication and, in the area of constitutional law, how they should exercise their powers of review. Much of what he has to say about courts is voiced through Hercules, a mythical jurist with
p. 27 superhuman powers of ↳ reasoning, who is meant to represent the model of what everyone who sits on the Bench should aspire to be.[112]

A lot of Dworkin's advice to the judiciary is quite conventional. He agrees with originalists, for example, that when judges interpret large and sweeping phrases such as those that distinguish the American Bill of Rights, they must begin with what those who created the document actually said.[113] In that initial step, history is a crucial interpretative aid because, Dworkin says, 'we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say in speaking as he did'.[114] Other sources of meaning to which judges should refer include 'the structural design of the Constitution as a whole' and 'the dominant lines of past constitutional interpretation by other judges'.[115] Dworkin encourages judges to think of themselves as joint authors writing separate chapters that fit in and make sense of a novel that never ends.[116] Their overarching ambition, he says, should be to develop 'the best conception of constitutional moral principles ... that fits the broad story of [a country's] historical record'.[117]

Dworkin realizes that in many cases traditional legal sources will not be able to supply one single, dominant meaning. He admits 'very different, even contrary, conceptions of constitutional principle ... will often fit language, precedent, and practice well enough to pass these tests'.[118] It is at this point in the review process, when no clear answer stands out, that Dworkin instructs judges to enter a 'postinterpretive or reforming stage',[119] in which they should look to the insights and analysis of moral and political philosophy, and it is here that he breaks new ground. Although he believes judges are instinctively inclined to this method of interpretation, he acknowledges that it is almost never openly endorsed in their decisions and that it would be 'revolutionary', even 'suicidal' if they did.[120] In mounting a sustained and passionate call for judges to do openly the moral and political philosophy that they cannot avoid, Dworkin, like Ely and the process theory

he uncovered, was a pioneer. Although other scholars have since endorsed the method,[121] Hercules will always be recognized as law's original philosopher king.

In defending a moral reading of constitutional texts Dworkin makes no claim for its neutrality. The very idea strikes him as preposterous.[122] Like 'post Ely proceduralists', his position is that there are no morally neutral strategies for interpreting a constitution; no morally neutral answers to the controversial constitutional issues courts are called on to decide. The moral reading does not dictate that a constitution
p. 28 should be read from either a liberal or conservative ↳ perspective. Rather, it is expected that liberal and conservative judges will each draw on their different legal and political philosophies to work out their particular conceptions of liberty, equality, and fraternity so that in every case competing theories of law and justice can confront each other and those with the best argument should carry the day.[123]

Dworkin himself favours a liberal conception of judicial review. He thinks the moral principles that can be derived from a constitution should be cast in the widest and most general terms possible. In the case of the US Bill of Rights, he believes these principles oblige government to 'treat all those subject to its dominion as having equal moral and political status ... to treat them all with equal concern ... and respect'.[124] For the judge that means 'if the constitutional rights acknowledged for one group presuppose more general principles that would support other constitutional rights for other groups, then the latter must be acknowledged and enforced as well'.[125] Even if it cannot meet a strict test of neutrality, Dworkin argues the liberal conception is superior to all its rivals because it fits the cases, particularly those decided in the era of the Warren Court, and shows them, and the political culture of which they are a part, in their best possible light.

As well as satisfying the twin (factual and normative) tests of 'fit' and 'value' better than any other method of interpretation, Dworkin argues moral readings of constitutional texts impose real constraints on judges deciding cases on the basis of their politics and personal preferences. Principled readings of text, history, and prior cases, he says, dictate the answers in most cases, 'and [leave] no room for the play of personal moral conviction'.[126] Most cases, he believes, are not hard cases and the criterion of fit 'sharply limit[s] the latitude the moral reading gives to individual judges'.[127]

The eloquence and erudition of Dworkin's writing has been acknowledged and applauded from the beginning and will no doubt continue to be for years to come. Colloquia are regularly convened to discuss different dimensions of his work and evaluations of his theory are a staple of the academic press. Much of the reaction is appropriately flattering and appreciative for his having raised new and challenging ways of thinking about the power of judicial review and in so doing substantially enhancing the quality of the debate. But, in the end, relatively few academics and as yet no judges have (openly at least) advocated that the limits of legitimate lawmaking ought to be marked out in the way he says they must. In fact, virtually no part of his theory has gone unscathed. Literary critics have challenged his ideas about interpretation and his
p. 29 claims for its objectivity and capacity to generate uniquely right answers in law.[128] Legal philosophers ↳ questioned the coherence of his method of deriving individual rights.[129] Most critically, for our purposes, his theory of adjudication and especially his instruction to judges that in the hardest constitutional cases, when all else fails, they should reason as moral and political philosophers has been subjected to withering criticism from all sides.[130]

Originalists and proceduralists attack Dworkin's model of judicial review in exactly the same way and on the same basic grounds as he has trashed theirs. First, they reject his claim that a moral reading provides an effective check against judges practising politics rather than enforcing the law. Secondly, they say, the picture he paints of how judges should exercise their powers of review neither fits the way cases are actually decided by the courts nor shows the practice in its best possible light. Even on his own less demanding standards of fit and value, rival theorists argue that Dworkin comes up short.

From the judges' perspective, the biggest problem with Dworkin's model is that it effectively allows each of them to reach diametrically opposed conclusions about the constitutionality of whatever law they are asked to review. His theory provides them with little practical guidance about the method of reasoning they should use in any specific case. It doesn't, for example, show them a principled way of deciding when history and precedent should govern a case and when bedrock principles of moral and political philosophy should carry the day. In so many of the most controversial and contested cases about abortion, capital punishment, gay rights, or social and economic rights, fit and value pull in opposite directions.[131] On gay rights, for example, justice demands that they be given the same level of protection against discrimination as everyone else but the jurisprudence, at least in the United States, provides considerably less. American constitutional law has always taken the position that gays and lesbians are not as equal as women or blacks. They can only insist that governments act rationally, not that they also be fair. Precedent and principle hold out very different futures for lesbians and gays, and judges are, on Dworkin's theory, entirely unconstrained in deciding which tomorrow will see the dawn of another day.

Sometimes Dworkin thinks fit is controlling. He instructs American judges, for example, that it would be wrong and violate the integrity of the constitution for them to interpret the sweeping guarantees of liberty and equality in the Fifth and Fourteenth Amendments to include social and economic rights (such as housing and healthcare) for the displaced and the infirm. Even though he recognizes that people living in
p. 30 poverty are denied the equal concern and respect that is their ↳ due, he thinks that American judges must defer to the fact that positive rights against the state are simply not part of 'the settled understandings ... of the broad story of America's historical record'.[132]

In other cases, however, fit counts for almost nothing. The right answers to questions about the legitimacy of laws that mandate capital punishment or prohibit abortion and euthanasia are, in Dworkin's view, only to be found in the deepest and most profound insights of moral and political philosophy.[133] Even though there is little or nothing in the language or history or practice or settled understandings of the American constitution that suggests laws of this kind are unconstitutional, on the best moral reading, Dworkin insists they are.

What is missing in Dworkin's theory is a principled explanation for why judges must defer to settled practice and precedent in the case of social and economic rights but not when they tackle life and death issues such as capital punishment, abortion, and euthanasia. Fit and value may be necessary conditions for an adequate theory of judicial review but without an overarching principle that dictates how they should be reconciled they are plainly not enough. Whether fit or value, precedent or philosophy, is to be given priority in any case remains wholly within the discretion of each judge.

The ease with which history and precedent can be manipulated within Dworkin's theory has been widely seen as one of its major failings. On First Amendment issues and on the right to abort, for example, Cass Sunstein characterized his historical and doctrinal analysis as 'haphazard' at best.[134] Michael McConnell has been even more severe. He took Dworkin to task for his endorsement of the Supreme Court's declaration in *Romer* v. *Evans*, that gays have a right not to be subjected to laws that express the community's disapproval of their sexual morality, in spite of the fact that it was completely inconsistent with its earlier decision in *Bowers* v. *Hardwick* that it was perfectly proper for the state of Georgia to make sodomy a crime, and did not even mention *Bowers* by name. Dworkin's tolerance of such cavalier treatment of a ruling everyone considered a pivotal case shows, says McConnell, that the moral reading of a constitution 'collapses into self-contradiction'.[135]

Although much of his writing does attempt to respond to points made by his critics, Dworkin devotes relatively little time to this aspect of his theory of adjudication.[136] Indeed, even though he says his critics' charge that his model allows judges too much room to impose their own values on society is 'exaggerated',
p. 31 his method endorses practices and ways of reasoning that allow them to do ↳ precisely that.[137] Each judge

is expected to address every case from their different conceptions of justice and political morality. Dworkin not only concedes but thinks it is important to emphasize that every 'constitutional opinion is sensitive [to each judge's] political conviction'.[138] As a result, 'liberal' and 'conservative' judges who draw inspiration from different legal and political philosophers will read the same cases, even pivotal cases, quite differently.[139] So, for example, the reaction of liberals such as Dworkin and conservatives such as Scalia to landmark such cases as *Roe* v. *Wade* (recognizing a qualified right to an abortion) and *Bowers* v. *Hardwick* (upholding laws that make sodomy a crime) is exactly the opposite. Where Dworkin counsels respect for the former and reversal of the latter, Scalia encourages his fellow judges to do exactly the reverse.[140] In effect, because there are many political traditions from which a judge might proceed, outcomes could effectively be determined before a case even begins and judgments could be summarized, as John Hart Ely amusingly suggested, as 'We like Rawls, you like Nozick, we win 6–3. Statute invalidated.'[141]

Indeed, even among judges who share the same moral values and who can agree on the extent to which law and philosophy ought to figure in their deliberation, Dworkin's theory allows them to remain free to formulate whatever principles they find in the text, history, practice, and philosophical premises of the constitution at whatever level of generality they think best 'fits the broad story of America's constitutional record … and does most credit to the nation'.[142] Radically different principles can be drawn from precedents such as *Roe* v. *Wade* and *Bowers* v. *Hardwick* even among people who agree on whether either or both of them should be endorsed or overturned. Although he personally favours stating constitutional principles as broadly as possible, he considers it likely and legitimate for others, whose legal and philosophical orientations are different, to formulate them in a less expansive way.

Not only does Dworkin allow judges a huge discretion in deciding how broadly constitutional principles should be formulated, and what their 'gravitational force' should be, he also thinks it is within their prerogative to qualify and compromise their commitment to their principles whenever they think, on balance, that would be a good thing to do. Real judges, Dworkin acknowledges, who try to adhere to his method of constitutional interpretation will face the serious practical problem of having to decide when and how much they should sacrifice what their principles tell them is the right answer in order to gain the
p. 32 support of other justices whose moral reading leads them to a different ↳ understanding of a case.[143] On courts in which each judge is encouraged to aspire to interpretations that 'do most credit to the nation' and in which decisions are made by majority rule, principled judgments must inevitably give way to rulings that are ultimately determined by how much each judge is prepared to wheel and deal. The only judge who never has to trade on his principles is 'Hercules', Dworkin's mythical jurist whose powers of reasoning are greater than any living judge and, being omnipotent, sits by himself.

The complaint that Dworkin's theory of judicial review provides no principled way for a court to distinguish laws that are legitimate from those that are not is a common refrain in the reviews of his work. Michael McConnell confesses to 'belabouring' the point.[144] For McConnell, the indeterminacy and subjectivity that plagues every attempt to reconcile the twin criteria of fit and value is made worse by the fact that the (moral) theory Dworkin says best meets their requirements has absolutely nothing to do with the way judges actually go about their work. It doesn't even satisfy his own criterion of fit. In McConnell's view, the disconnection between Dworkin's injunction to judges to draw on the resources of political and moral philosophy, and the way judges actually justify the decisions they make, is so extreme it amounts to trying to 'turn settled constitutional practice … on its head',[145] and it is hard to imagine anyone, including Dworkin, who would disagree. The image of the judge as a moral philosopher is certainly not one any originalist or proceduralist would embrace. They insist judges stick with the traditional sources of text, history, and precedent and say moral reasoning just doesn't fit the way the review process really works. The fact is—as Dworkin despairs—judges almost never openly engage in the kind of moral and philosophical reasoning that he recommends. Indeed, in the very hard cases, when 'very different, even contrary, conceptions of a constitutional principle … fit language, precedent and practice well enough',[146] typically

they do just the opposite. In those cases in which the constitution is ambiguous and open to more than one interpretation, the standard practice is for judges not to interfere and to allow the people to do whatever they think is in the best interests of their state. 'Mainstream practice', McConnell reminds Dworkin, 'treats any decision of the representative branches that survives the filters of text, history, practice, and precedent *as constitutional*.'[147]

Because Dworkin's theory asks judges to reason in a way that does not fit their self-understanding of their craft, and which leaves them free to base their decisions on their own philosophies of politics and law, it can also be attacked as being riddled with inconsistency and self-contradiction at the level of ideal theory as well. Assigning final responsibility for the moral character of a community ↳ to judges who are unelected, and in no way accountable to the people, is impossible to square with democracy's most basic requirement of showing every person, including those who make up the majority, equal concern and respect. To insist, for example, that the judges rather than the elected representatives of the people must determine the moral status of a foetus, as Dworkin does,[148] constitutes a massive derogation from the authority of each person and the sovereignty of the people as a whole to decide the great questions of life and death for themselves. Especially in difficult cases, when different conceptions of a constitutional principle can be derived from the traditional methods of textual exegesis, the logic of showing everyone equal concern and respect entails allowing the people, through their elected representatives—not the courts—to decide which course of action does most credit to their nation.[149] On the model of constitutional adjudication Dworkin supports, the people lose control of the moral development of their communities to a professional elite.[150] His model of lawyers, robed with philosophical pretensions, working out the details of the moral character of their communities, is fundamentally at odds with the equal autonomy and sovereignty of each of its members. It is not easy to find fault with Michael McConnell's conclusion that on Dworkin's theory, 'democracy ... [is] ... just a charade'.[151]

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That Dworkin's Herculean effort to fashion a new way to understand law, one that dissolves the tension and stands between legal positivism and natural law, failed to convince many theorists or jurists will be surprising to no one, not even, probably, to Dworkin himself. His critics have simply applied to him the same arguments he levelled against them. His theory does not meet its own standards of legitimacy (fit and value) and provides no assurance that judges will never decide cases on the basis of their politics rather than on the law.

5. JUDICIAL PRACTICE

The debate between Dworkin and his rivals has been passionate and unforgiving. At the end of the millennium constitutional theory is unquestionably richer and better for it. Our understanding of our legal order is more sophisticated than at any time in the past. Still, and notwithstanding our enlightenment, a state of impasse persists. Each new theoretical contribution has included an effective critique of everything that has gone before.[152] For all our cleverness, we remain ↳ stalled in our search for a theory that can adequately explain and justify our choice of giving so much power to the courts.

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To escape the stalemate that has plagued constitutional theory for so long it is time to think about coming at the issue from a different direction. We might do better, and we certainly could do no worse, if we didn't worry so much about the best way to read constitutional texts and focused instead on how the practice of judicial review actually works. We could take up Michael Ignatieff's suggestion and concentrate on what the entrenchment of constitutional and international human rights actually does for people.[153] One way to discover what the 'rights revolution' has meant in practice is to borrow the methods of the common law to study how courts actually exercise their powers of review. The great genius of this ancient legal tradition is its pursuit of theory and overarching principles from the bottom up. Common lawyers think inductively

rather than moving down from premises by deduction. Reading a series of individual cases that address common problems leads one to larger principles of law. Instead of starting with a preconceived theory of law and democracy—of the right and the good—to which the jurisprudence is made to conform, the order is reversed and theory emerges out of the cases.

Using the approach of the common law to extend our understanding of constitutional theory, and in particular the practice of judicial review, would give us a new and fresh perspective on the problem. Studying cases, and how courts actually exercise their powers of review at the beginning of the inquiry, would give us for the first time a view from the ground floor. So far theorists of all persuasions—originalists, proceduralists, and moralists alike—have been inclined to reflect on the tension that exists between ideas of popular sovereignty and judicial review by looking down from the top. Each starts with a conception of what they think law and democracy should look like and what kind of government they imply and tries to construct a model of courts sitting in judgment of the people that is compatible with the model of democracy they prefer. Proceeding as common lawyers reverses the process by starting with the actual decisions of the courts and drawing out their implications for democracy at the end.

Trying to work out a theory of constitutional review as common lawyers might makes particular sense at this moment in time. For one thing, the approach has not been tried by any of the theorists who have dominated the debate so far and so would fill an obvious gap.[154] For another, there is now, for the first time, with so many different courts being entrusted with the powers of review, a rich jurisprudence to which the method of induction can be applied. Studying the courts' self-understanding of their role should also allow us to test whether ↳ Habermas's insistence that law is characterized by a unique and especially rational form of argumentation is justified or not. There is, it would seem, much to be gained and little to lose by initiating such a project and following where it leads. At worst it will save others the frustration of pursuing another dead end. At best it might finally explain why for the last fifty years ordinary people all over the world have chosen to put courts at the centre of their systems of government and whether, in the end, they were right.

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Notes

1 H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 6.

2 W. Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979), vol. 1, 91.

3 Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law* (Ithaca: Cornell University Press, 1965); Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon, 1989), ch. 3; Dennis Lloyd, *The Idea of Law* (London: Penguin, 1991), ch. 3; Carl J. Friedrich, *Constitutional Government and Democracy* (Boston: Ginn & Co., 1964), ch. 1.

4 *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 646, 652.

5 Gordon Wood, 'Reply', in Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), 129–30. See also Corwin, *Higher Law Background*, 84–7; Friedrich, *Constitutional Government*, chs. 6, 12.

6 Thomas Paine, *Common Sense*, in B. Kuklick (ed.), *Political Writings*, Rev. Student Edn. (Cambridge: University Press, 2000), 27–8.

7 *Marbury* v. *Madison* (1803) 5 US 1 Cranch 137, 177–8.

8 Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971), 25–42; Hans Kelson, 'Judicial Review of Legislation', 4 Journal of Politics (1942) 83.

9 For a review of the globalization of constitutional rights see Ran Herschl, 'The Political Origins of Judicial Empowerment Through Constitutionalization …' (2000) 25 Law and Social Inquiry 91. For an up-to-date compilation of constitutional texts see A. P. Blaustein and G. H. Flanz, *Constitutions of the Countries of the World* (loose-leaf) (Dobbs Ferry, NY: Oceana). For a comparative assessment of the globalization of constitutionalism see C. Neal Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995); Donald Jackson and C. Neal Tate (eds.), *Comparative Judicial Review and Public Policy* (Westport, Conn.: Greenwood Press, 1992).

10 Ronald Dworkin, *Freedom's Law* (Cambridge, Mass.: Harvard, 1996), 6, 71.

11 The critical, sceptical literature on judicial review is enormous. See e.g. J. Waldron, *Law and Disagreement* (Oxford: Clarendon, 1999), pt. III; M. Walzer, 'Philosophy and Democracy' (1981) 9 *Political Theory* 391; M. Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law*, (Cambridge, Mass.: Harvard University Press, 1988); M. Mandel, *The Charter of Rights and the Legalization of Politics* (Toronto: Wall & Thompson, 1989).

12 Constitution of the United States of America, 1st Amendment (1791) in Blaustein and Flanz, *Constitutions of the Countries of the World*.

13 Constitution of the Republic of South Africa, Articles 26–7, in Blaustein and Flanz, ibid.

14 *Soobramoney* v. *Ministry of Health* (Kwazulu-Natal) [1998] 1 SA 765; (1997) 4 BHRC 308.

15 *Grootboom* v. *Republic of South Africa* [2001] 1 SA 46.

16 Oliver Wendell Holmes, 'The Path of the Law' (1997) 110 Harv. L Rev. 991.

17 Richard Posner, 'Against Constitutional Theory' (1998) 73 NYUL Rev. 1; *The Problematics of Moral and Legal Theory* (Cambridge, Mass.: Harvard University Press, 1999), 144.

18 Story J, *Commentaries on the Constitution of the United States* (New York: Da Capo, 1970), at s 400.

19 Story J, *Commentaries on the Constitution of the United States* (New York: Da Capo, 1970), Preface. p. viii.

20 See e.g. *Slaughter-House* cases (1872) 83 US 36; *Reynolds* v. *US* (1878) 98 US 145.

21 *McCulloch* v. *Maryland* (1819) 17 US 316, 415. See also *Marbury* v. *Madison* (1803) SC 137, 176.

22 Robert Bork, *The Tempting of America* (New York: Free Press, 1990), 162–3.

23 Constitution of the United States of America, *supra* n. 9, 1st and 14th Amendments.

24 Robert Bork, 'The Impossibility of Finding Welfare Rights in the Constitution' (1979) Wash. ULQ 695; 'The Constitution, Original Intent and Economic Rights' (1986) 23 San Diego LR 823.

25 Scalia, *Matter of Interpretation*, 132, 145–6; Bork, *Tempting of America*, 213–14.

26 Bork, ibid. 149–50, 249–50. Bork, 'Constitution, Original Intent and Economic Rights' 827–8; see also Scalia's judgment in *Romer* v. *Evans* (1996) 517 US 620; ('Since the Constitution … says nothing about [homosexuality] it is left to be resolved by normal democratic means').

27 Bork, *Tempting of America*, 166–7. Michael McConnell, 'The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution' (1997) 65 Fordham L Rev. 1269.

28 Bork, *Tempting of America*, 265.

29 See e.g. W. Brugger, 'Legal Interpretation, Schools of Jurisprudence and Anthropology: Some Remarks From a German Point of View' (1994) 42 Am. J Comp. Law 395, 401; D. Beatty *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press 1995), 64–5.

30 See e.g. Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), ch. 2; Cass Sunstein, *The Partial Constitution* (Cambridge, Mass.: Harvard University Press, 1995), ch. 4; 'What Judge Bork Should Have Said' (1991) 23 Connecticut L Rev. 205; Richard Posner, 'Bork and Beethoven' (1990) 42 Stanford L Rev. 1365; John Hart Ely, *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980), ch. 2; Paul Brest 'The Misconceived Quest for the Original Understanding' (1980) 60 Boston UL Rev. 204.

31 Larry Alexander, 'Originalism or Who is Fred' (1996) 19 Harv JL and Pub. Pol, 321. See also Dworkin, *A Matter of Principle*.

32 R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), chs. 9, 10. 'Comment' in Scalia, *A Matter of Interpretation*, 116–27.

33 Dworkin, *A Matter of Principle*, ch. 2.

34 C. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996), 173.

35 Brest, 'The Misconceived Quest', 222.

36 The extent of the judges' freedom to define for themselves how broadly or narrowly the words of the constitution should be read is especially evident in the Court's recent judgment in *Lawrence* v. *Texas* (2003) 123 S. Ct. 2472 in which Scalia, Rehnquist, and Thomas dissented from their colleagues' ruling that sodomy laws are unconstitutional because rather than interpret the guarantee of liberty (that is also part of the 14th Amendment) expansively to include a right of personal privacy as the majority did, they read it very rigidly as not marking off a private domain of 'deviant sex'.

37 Bork, *Tempting of America*, 150; see also McConnell, 'Importance of Humility'.

38 Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 U Cincinnati L Rev. 861; *A Matter of Interpretation*, 45.

39 Bork, *Tempting of America*, 177.

40 Ronald Dworkin dismissed it as 'wholly circular' (*A Matter of Principle*, 54), Cass Sunstein described it as a 'rallying cry' that wasn't an argument at all. As far as Sunstein is concerned, anyone who denies that originalism is itself based on substantive values and principles of politics and morality is 'without self-consciousness': 'What Bork Should have Said', 211, 215.

41 H. Jefferson Powell 'The Original Understanding of Original Intent' (1985) 98 Harv. L Rev. 888; see also Brest, 'The Misconceived Quest', 215.

42 Richard Posner, 'Bork and Beethoven' (1990) 42 Stanford L Rev. 1364; Cass Sunstein, 'What Judge Bork Should Have Said'

(1991) 23 Connecticut L Rev. 205; see also W. Eskridge, *The Case for Same-Sex Marriage* (New York: Free Press, 1996), 125, 153, 174. And see Ruth Bader Ginsburg, 'Sexual Equality under the Fourteenth and Equal Rights Amendments' [1979] Wash. ULQ 161 ('Boldly dynamic interpretation departing radically from the original understanding is required to tie to the Fourteenth Amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities and opportunities.'

43 *Missouri* v. *Holland* (1920) 252 US 416, 433.

44 Scalia, *A Matter of Interpretation*, 139–40; Bork, *Tempting of America*, 158.

45 Bork, ibid. 150, 330, cf. 'Neutral Principles and Some First Amendment Problems' (1971) 47 Indiana LJ 1.

46 Scalia, *A Matter of Interpretation*, 46, 132, 145–6.

47 Scalia, 'Originalism: the Lesser Evil', 861.

48 *Brown* v. *Board of Education* (1954) 347 US 483.

49 See e.g. *Gideon* v. *Wainright* (1963) 372 US 335. *Miranda* v. *Arizona* (1966) 384 US 436.

50 See e.g. *Baker* v. *Carr* (1962) 369 US 186; *Reynolds* v. *Sims* (1964) 377 US 533.

51 *Griswold* v. *Connecticut* (1965) 381 US 479.

52 Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73 Harv. L Rev. 1; A. Bickel, *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1978).

53 See e.g. Ronald Dworkin, *Life's Dominion* (New York: Vintage Books, 1994), 138–43; Alexander Bickel, 'The Original Understanding and the Segregation Decision' (1953) 69 Harv. L Rev. 1; Michael Klarman, 'Brown, Originalism and Constitutional Theory …' (1995) 81 Virginia L Rev. 1881; Posner, 'Bork and Beethoven'; Sunstein, 'What Judge Bork Should Have Said', 214 n. 40, cf. Michael McConnell, 'Originalism and the Desegregation Decisions' (1995) 81 Virginia L Rev. 947.

54 Ely, *Democracy and Distrust*.

55 Ely, *Democracy and Distrust*. ch. 4.

56 Ibid. 102.

57 Ibid. 103.

58 Richard Posner, '*Democracy and Distrust* Revisited' (1991) 77 Virginia L Rev. 641.

59 Gerald Gunther, book jacket, *Democracy and Distrust*.

60 Henry P. Monaghan, book jacket, *Democracy and Distrust*.

61 See e.g. Patrick Monahan, *Politics and the Constitution* (Toronto: Carswell, 1987); Jürgen Habermas, *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1996); Cass Sunstein, *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001).

62 Laurence Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 Yale LJ 1063.

63 Ronald Dworkin, *A Matter of Principle*, 57–71; Bork, *Tempting of America*, 196.

64 Dworkin, *A Matter of Principle*, ibid.

65 Tribe, 'Puzzling Persistence', 1078.

66 Bork, *Tempting of America*, 199.

67 Ely, *Democracy and Distrust*, 103.

68 Tribe, 'Puzzling Persistence', 1072–6.

69 Ely, *Democracy and Distrust*, 154.

70 Sunstein, *Designing Democracy*, 6.

71 Ibid. 7.

72 Cass Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996), 179.

73 Sunstein, *Designing Democracy*, 9–11, 205–6.

74 Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass.: Harvard University Press, 1999).

75 Sunstein, *Legal Reasoning and Political Conflict*, 180; *Designing Democracy*, ch. 8.

76 *Designing Democracy*, 193, 204, 208; *Legal Reasoning*, 178.

77 Monahan, *Politics and the Constitution*, 99–120.

78 Ibid. 137.

79 Ibid. 138.

80 Ibid. 125.

81 Sunstein, *Designing Democracy*, ch. 2.

82 Habermas, *Between Facts and Norms*, 107, 121.

83 Ibid. 263.

84 Ibid. 460.

85 Habermas, *Between Facts and Norms*, 107.

86 Ibid. 121.

87 Ibid. 122.
88 Ibid. 107, 263.
89 Ibid. 123, 125, 247, 263, 415–17.
90 Ibid. 266.
91 Ibid. 172, 217–19, 229–32, 265–6.
92 William Rehg, 'Translator's Introduction', in Habermas, *Between Facts and Norms*, p. xxiv.
93 Bernhard Schlink, 'The Dynamics of Constitutional Adjudication' (1996) 17 Cardozo L Rev. 1231. See also Robert Alexy, 'Basic Rights and Democracy in Jürgen Habermas's Procedural Paradigm of the Law' (1983) 7 Ratio Juris 227.
94 Habermas, *Between Facts and Norms*, 274.
95 Ibid. 244, 280.
96 Ibid. 263.
97 Ibid. 123.
98 Ely, *Democracy and Distrust*, 162.
99 Sunstein, *Designing Democracy*, 10, 205–6.
100 Monahan, *Politics and the Constitution*, 126.
101 Frank Michelman, 'Welfare Rights in a Constitutional Democracy' [1979] Wash. ULQ 659. See also 'Constitutional Welfare Rights and a Theory of Justice', in N. Daniels, *Reading Rawls* (Stanford: University of Stanford Press, 1989).
102 Ely, *Democracy and Distrust*, 164–70, Monahan, *Politics and the Constitution*, ch. 6.7; Sunstein, *Designing Democracy*, chs. 7, 8, 9.
103 Monahan, *Politics and the Constitution*, 129.
104 Sunstein, *Designing Democracy*, 177.
105 Ibid. 156, 175.
106 Dworkin, *A Matter of Principle*, ch. 2.
107 Ronald Dworkin, 'In Praise of Theory' (1997) 29 Arizona St. LJ 353, 376.
108 Dworkin, *Freedom's Law*, 14.
109 The books include: *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977); *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985); *Law's Empire* (Cambridge Mass.: Harvard University Press, 1986); *Life's Dominion* (New York: Knopf, 1993); *Freedom's Law* (Cambridge, Mass.: Harvard University Press, 1996); and *Sovereign Virtue* (Cambridge, Mass.: Harvard University Press, 2000).
110 R. Dworkin, 'The Moral Reading and the Majoritarian Premise' in *Freedoms Law*, ch. 1.
111 Dworkin, *Freedom's Law*, 6, 71. R. Dworkin 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve' (1997) 65 Ford L Rev. 1249, 1268.
112 See e.g. Dworkin, *Taking Rights Seriously*, 105 ff.; *Law's Empire*, chs. 7, 8, 9, 10.
113 Dworkin, *Freedom's Law*, 10.
114 Ibid. 8.
115 Ibid. 10.
116 Dworkin, *Law's Empire*, ch. 7.
117 Dworkin, *Freedom's Law*, 11.
118 Ibid.
119 Dworkin, *Law's Empire*, 65–8.
120 Dworkin, *Freedom's Law*, 3, 6.
121 e.g. David Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986); Michael Perry, *The Constitution in the Courts: Law or Politics* (New York: Oxford University Press, 1994).
122 Dworkin, *Freedom's Law*, 36–7, 313–20.
123 Dworkin, *Freedom's Law*, 2–3, 36–7, 82, 313–20.
124 Ibid. 7–8, 10.
125 Dworkin, *Sovereign's Virtue*, 455.
126 Dworkin, *Freedom's Law*, 10–11.
127 Ibid. 10.
128 Stanley Fish, *Doing What Comes Naturally* (Durham, NC: Duke University Press, 1990), chs. 1, 2, 16.
129 See e.g. H. L. A. Hart, 'Between Utility and Rights' (1979) 79 Colum. L Rev. 828.
130 See e.g. McConnell, 'The Importance of Humility in Judicial Review'; John Hart Ely, 'Professor Dworkin's External/Personal Preference Distinction' (1983) Duke LJ 959; Larry Alexander, 'Striking Back at the Empire …' (1987) 6 Law & Philosophy 419; Bork, *Tempting of America*, 213; R. Posner, *The Problematics of Moral and Legal Theory* (Cambridge, Mass.: Harvard University Press, 1999); Monahan, *Politics and the Constitution*, ch. 5.
131 McConnell, 'The Importance of Humility in Judicial Review', 1270–8.

132 Dworkin, *Freedom's Law*, 11, 36; *Law's Empire*, 404; 'The Arduous Virtue of Fidelity', 1254.
133 Dworkin, *Life's Dominion*; McConnell, 'The Importance of Humility …', 1277.
134 Cass Sunstein, 'Earl Warren is Dead', *The New Republic*, 13 May 1996, 35–9.
135 McConnell, 'The Importance of Humility', 1289.
136 Although Dworkin has said that it would have been better for the Court to have explicitly overruled *Bowers* in *Romer*, he has never explained why the Court's opinion in *Bowers* wasn't binding on the judges who sat on *Romer*. See R. Dworkin, 'Reflections on Fidelity …' (1997) 65 Ford L Rev. 1799, 1811 n. 67.
137 Dworkin, *Freedom's Law*, 11; *Law's Empire*, 255 ('Different judges will set this threshold [of fit] differently').
138 Dworkin, *Freedom's Law*, 2–3, 36–7, 319; 'Natural Law Revisited' (1982) 34 U Fla. L Rev. 165, 170.
139 Dworkin, *Law's Empire*, 65–8, 240–50, 255–60.
140 Compare Dworkin, *Freedom's Law*, ch. 3; *Sovereign's Virtue*, ch. 14; and Scalia, *A Matter of Interpretation*, 83, 144–9; *Lawrence* v. *Texas*.
141 Ely, *Democracy and Distrust*, 58.
142 Dworkin, *Freedom's Law*, 7–8, 11.
143 Dworkin, *Law's Empire*, 380. See also 'In Praise of Theory', 369–72.
144 McConnell, 'The Importance of Humility', 1278.
145 Ibid. 1273; see also Sunstein, 'Earl Warren is Dead', 38.
146 Dworkin, *Freedom's Law*, 11.
147 McConnell, 'The Importance of Humility', 1272. See also Sunstein, 'Earl Warren is Dead', 37–8.
148 Dworkin, *Life's Dominion*, 164–5; *Freedom's Law*, 102–10; *Sovereign Virtue*, ch. 12.
149 McConnell, 'The Importance of Humility', 1273–5, 1290–1; Sunstein, 'Earl Warren is Dead', 37, 39.
150 Although Dworkin recognizes that an argument can be made that the process of constitutional review ought to be carried out by institutions that are politically accountable, his belief is that the lesson of America's experience is that, all things considered, judges can do a better job. See *Freedom's Law*, 33–5.
151 McConnell, 'The Importance of Humility', 1276.
152 Cf. Dworkin, *A Matter of Principle*, ch. 2; Ely, *Democracy and Distrust*, chs. 1–3; Monahan, *Politics and the Constitution*, ch. 5; Bork, *Tempting of America*, chs. 9–12.
153 Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001), 54.
154 See e.g. Dworkin, *Freedom's Law*, 35; Habermas, *Between Facts and Norms*, 229; see generally B. Markesinis, 'Comparative Law—A Subject in Search of an Audience' (1990) 53 Mod. L Rev. 1, and B. Schlink, 'The Dynamics of Constitutional Adjudication' (1996) 17 Cardozo L Rev. 1231.